Rapanos v. United States: A Call for Partnership

Almost twenty years ago, the National Wetlands Newsletter *devoted almost an entire issue to the topic of wetlands hydrology, hydrogeology, and the need for coordination among floodplain and wetland managers.[1] That call for partnership and mutual understanding has proved to be prescient.*

BY EDWARD A. THOMAS

On June 19, 2006, the U.S. Supreme Court handed down its decision in *Rapanos v. United States*, which involved two cases that came out of the U.S. Court of Appeals for the Sixth Circuit.[2] In one case (*Rapanos v. United States*), the plaintiffs had refused to request a permit as required by the U.S. Army Corps of Engineer under the authority delegated to it under §404 of the Clean Water Act; in the other case (*Carabell v. U.S. Army Corps of Engineers*), the Corps denied the §404 permit and the plaintiff appealed the decision. The issue before the Court was seemingly straightforward: What is a "water" of the United States, and, consequently, what is the geographic extent of the wetlands that may be regulated by the federal government under the CWA? Yet the Supreme Court's opinion is rather complex, filled with bitter, angry barbs tossed back and forth between and among the Justices. In the end, the Justices voted 4-1-4.

Writing for four Justices, Justice Stevens, who was joined by Justices Breyer, Ginsburg, and Souter, said that the Corps had jurisdiction of the wetlands in question and that the decisions of the Corps and lower court should be sustained. Also writing for four Justices, Justice Scalia, who was joined by Chief Justice Roberts and Justices Thomas and Alito, said that the opinion of the lower courts should be overturned. Justice Scalia clearly thought that the Corps' assertion of federal jurisdiction was far too broad. Specifically he indicated that the phrase "the waters of the United States" includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams," "oceans, rivers, [and] lakes." He also notes that "waters of the United States" does "not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." Justice Kennedy agreed with Justice Scalia that the matter should be returned to the lower courts for re-processing in accordance with revised instructions. Unlike Scalia, however, Kennedy indicated that the lower courts may well find that the Corps appropriately had jurisdiction over the wetlands at issue in *Rapanos*. On remand, the Corps should establish a clear "nexus" between federal concerns with respect to the "waters of the United States" and the particular land to be regulated.

A Few Questions & Answers

In the past, as a matter of federal jurisprudence, Justice Kennedy's opinion would be considered controlling. However in light of a recent Supreme Court case, *League of United Latin American Citizens v. Perry*,[3] the U.S. Department of Justice has indicated in testimony before a congressional subcommittee that they are considering issuing guidance to EPA and the Corps stating that both the very narrow criteria set forth by Justice Scalia and the broader Kennedy "Nexus" test may be used on "a case by case basis." EPA and the Corps plan to issue clarification as soon as possible. Given the number of opinions offered by the Court, the ruling is quite complex. Perhaps asking and answering a few questions will help put things into perspective.

A. Question: Does Rapanos *Mean That The Court Has Somehow Disapproved of Either Floodplain or Wetland Regulation?*

Answer: No! No! Quite the contrary! Four Justices believe that the Corps has stretched federal jurisdiction far beyond the statutory intent of U.S. Congress. That is, they believe the federal government is interfering with the proper land use prerogatives of state and local government. But there is no indication whatsoever from any of the Justices that wetland and floodplain regulation is anything other than a perfectly appropriate activity of government. The disagreement between the Justices concerns the appropriate level of government to make land use decisions concerning wetlands that are not physically linked to "waters of the United States" on an ongoing basis. Conversely, four Justices think that the wetlands in question can be properly regulated by our federal government based on the Corps' interpretation of the CWA as that Act is presently written. Meanwhile, the controlling opinion by Justice Kennedy requires the lower courts to determine if there are additional facts that will establish a nexus between the wetlands at issue and "waters of the United States."

B. Question: What in the World is a "Nexus"?

Answer: "Nexus" is a legal term that means a connection or link between two things. Sometimes the Supreme Court uses the term "nexus" to determine whether there is an extremely close, precise, and definite fit

---

Edward Thomas is a floodplain manager, disaster relief specialist, and attorney. *Michael Baker Inc. provided the funding for the research and development of this article.* *The opinions expressed are the author's and do not reflect approval by any organization. This is an opinion piece based on general principals of law. It is not legal advice. For legal advice see a licensed attorney in your jurisdiction.*

between two individuals or two separate actions. For example, the Supreme Court uses the "nexus test" to evaluate whether the actions of a private individual should be considered to be the responsibility of another seemingly unrelated party.[4] On the other hand, in cases analyzing whether a government action is an unconstitutional "taking" of property in contravention of the Fifth Amendment of the U.S. Constitution, the Court uses the term "nexus" to determine whether a claimed relationship between an articulated government interest and the exaction imposed on a development permit seeker has any reality whatsoever.[5]

So, as Justice Kennedy uses the term "nexus" in the controlling opinion, nexus means either: (1) a very tight relationship; or (2) more than an ephemeral relationship. Or, it may mean something in between. Take your pick. My legal analysis is that Kennedy most likely means "nexus" as the term is used in takings jurisprudence; that is, a relationship that is real and not a clever falsehood. Justice Kennedy also seems to want something more specific and tangible than an unsubstantiated conclusion that one thing has a "major effect" on another.

With regard to proving a nexus, the quantitative analysis of many water quality effects may not be always possible. However, using flood and stormwater hydrology and hydraulics techniques, one can ascertain the quantitative numerical impacts that the activity for which a §404 permit is being sought would have on flooding of the "waters of the United States." This calculation may often be a great place to start in developing an analysis of the potential effect of a proposed development. This conclusion is bolstered by language in the opinion written by Justice Kennedy. Kennedy indicates that in the context of the CWA:

> The nexus required must be assessed in terms of the Act's goals and purposes. Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and it pursued that objective by restricting dumping and filling in "navigable waters" . . . . [T]he rationale for the Clean Water Act wetlands regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, *flood control, and runoff storage.* Accordingly, *wetlands possess the requisite nexus,* and thus come within the statutory phrase "navigable waters," *if the wetlands, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense.* When, in contrast, their effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term "navigable waters." (Citations omitted, emphasis added)

C. Question: What Does Rapanos Mean for Floodplain and Stormwater Managers?

Answer: This case presents an enormous opportunity for floodplain and stormwater managers to further develop win-win relationships with wetland managers, as well as with all others concerned with water quality. Stormwater and floodplain managers are increasingly aware of the enormous flood protective qualities of our precious wetlands. Destruction of wetlands can have and has had severely deleterious effects on flooding in this nation. We now can offer help to beleaguered wetland managers as they try to help protect areas that prevent catastrophic flooding.

When one is seeking to quantify the impact of filling a wetland, floodplain/stormwater hydrology and hydraulics offer a great place to start. As set forth in great detail in the Association of State Floodplain Manager's publication *No Adverse Impact: Floodplain Management and the Courts*,[6] courts have historically been extremely sensitive to protecting public safety by supporting the fair and proper regulation of development so that development does not cause harm to others. Or as the ASFPM summarizes the concept: courts are quite prone to accept a "no adverse impact" analysis. The *Rapanos* case, therefore, offers significant opportunities for stormwater and floodplain managers to offer win-win solutions to wetland managers as they define the quantitative impacts that filling wetlands have on flood depth and velocity.

Specifically, floodplain and stormwater managers can help wetland managers understand and quantify the fundamental fact that "today's floodplain is not tomorrow's floodplain." Wetland loss, loss of natural valley storage, and loss of permeable surface area will often have a serious and predictable deleterious effect on future flood conditions. Newly developed computer simulations, known as future conditions hydrology, can calculate future flood heights should development take place in accordance with local zoning rules presently in effect. In North Carolina, for instance, the Flood Insurance Rate Map Study for Charlotte-Mecklenburg County used new updated topography, state-of-the art computer simulations, and future conditions hydrology and hydraulic modeling techniques. The study determined that even were the community to comply with the minimum standards of the National Flood Insurance Program, future flood heights in streams and rivers would increase, over previous calculations, by nearly six feet as wetlands and floodplains are filled and otherwise developed.[7]

This sort of quantitative analysis will help determine if a proposed activity in wetlands, "*alone or in combination with similarly situated lands in the region,*" as Justice Kennedy helpfully points out, has a "nexus" to the "waters of the United States."

D. Question: Are There Any Wetland, Stormwater, or Floodplain Managers Who Need to be Particularly Concerned About Specific Aspects of This Decision?

Answer: Yes, those whose areas of responsibility include areas of intermittent or occasional stream creek or arroyo flow. Although it is not controlling, the Scalia opinion indicates that "establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel con-

Continued on page 15

A Call For Partnership, continued from page 9

tains a 'wate[r] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that *the wetland has a continuous surface connection* with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

Had the majority of the Court gone along with this concept, huge areas of the nation that contain intermittent streams and creeks, in the arid West in particular, would apparently not be covered by the protections currently afforded by the CWA. Justice Kennedy's controlling opinion, however, offers us an opportunity to demonstrate that such waters may indeed have a "nexus" to "waters of the United States."

E. Question: So, Where Do We Go From Here?

Answer: Wetland managers will find considerable value in the expertise of floodplain and stormwater managers in determining the "nexus" between activities that affect wetlands and floods on the "waters of the Unites States." Floodplain and stormwater managers need to support the actions of wetland managers as those water stewards restore, protect, and nurture the wetlands that we floodplain and stormwater managers find so valuable in reducing and preventing the awful misery caused by flooding.

A Call for Action

The water managers of this nation need to work together better than we have in the past. Let us, all of us—wetland, floodplain, and stormwater managers as well as other members of the water quality community—reach out and offer help, support, and technical advice to each other. We all deal with the same substance and have similar paths to the same goal of serving and protecting the public.

Additional Information

An enormous amount of additional information on wetlands in general, as well as on *Rapanos*, can be found on the Association of State Wetland Managers' website at http://www.aswm.org. ■

NOTES

[1] *National Wetlands Newsletter* 9, No. 2 (Mar.-Apr. 1987).
[2] Rapanos v. United States, 126 S. Ct. 2208 (2006); Rapanos v. United States, 376 F.3d 629 (6th Cir. 2004); Carabell v. Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004).
[3] No. 05-204 (June 28, 2006).
[4] *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).
[5] *See* the discussion of *Nollan v. California Coastal Commission*, 483 U.S. 25 1987), and *Dolan v. Tigard*, 512 U.S. 374 (1994), in Edward A. Thomas, "Courts Issue Good News for Floodplain Management," on the Association of State Floodplain Manager's website at http://www.floods.org/PDF/EdThomas_Courts_GoodNews_FloodplainManagement.pdf.
[6] Jon A. Kusler & Edward A. Thomas, *No Adverse Impact: Floodplain Management and the Courts* (ASFPM Nov. 2005), *available at* http://www.floods.org/NoAdverseImpact/NAI_Legal_Paper_102805.pdf.
[7] Larry Larson & Doug Plasencia, "No Adverse Impact: A New Direction in Floodplain Management Policy," *Natural Hazards Review* 2 (2001): 167-181, *available at* http://www.floods.org/NoAdverseImpact/NAIjournal.pdf.

Rapanos and the States, continued from page 5

point source discharges permitted under CWA (excluding stormwater and nonstormwater general permits) were located on intermittent, ephemeral, or very small perennial streams. In addition, 90% of the source water protection areas providing drinking water for over 110 million Americans were located in the headwater areas of watersheds in the United States (excluding Alaska).

Third, states need to provide information to the public clarifying those waters that are regulated under state programs to minimize the potential for illegal activities. Many fills have occurred after high profile court cases in the past because landowners assume permits are not needed for a much larger range of activities than those impacted by the court decision. This was true in both Virginia and North Carolina after the U.S. Court of Appeals for the Fourth Circuit Court overturned the "Tulloch rule," which restricted drainage activities under CWA §404.

Fourth, states need to work with the Corps and EPA to help determine the extent to which waters may require a case-by-case versus a categorical "significant nexus" determination. Undertaking a significant nexus test for each permit application will lead to increased workloads and increased costs for the permitting agency and the permit applicant. A logical step will be to identify classes or types of waters within the state that have a significant nexus to U.S. waters. This will enable the agencies to continue to process permit applications within a reasonable timeframe.

Fifth, if a state does document reductions in CWA jurisdiction that are detrimental to the public interest, the state should work toward new legislation or regulations. States need to identify state and local programs that might be used to protect waters at risk, any changes needed to those programs, and the costs of implementing those changes. And while many states do not have state permitting programs for dredge and fill activities, they do have water quality statutes that address headwaters streams and wetlands. These statutes might be used to authorize state pollution control or public water agencies to issue permits for dredge and fill activities. Such authorization would require rulemaking or additional legislation, depending on the state.

In conclusion, states need to respond proactively to *Rapanos*. They need to determine what wetlands and waters are at risk and develop new legislation or rules to address these risks. They need to work closely with the Corps, EPA, other federal agencies, and local governments. The U.S. Congress should support these efforts. *Rapanos* will not invalidate state or local wetland regulatory programs. To the contrary—attention is now focused on the enhanced regulatory role states and localities must play in order to fill any gaps created by the decision. How budget-starved states and local governments will respond remains to be seen. ■